ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	
APPLICATION OF BELLSOUTH CORPORATION, BELLSOUTH TELECOMMUNICATIONS, INC. AND BELLSOUTH LONG DISTANCE, INC. FOR PROVISION OF IN-REGION, INTERLATA SERVICES IN SOUTH CAROLINA	CC Docket No. 97-208

OPPOSITION OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS RESELLERS ASSOCIATION

Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS LAW GROUP
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006
(202) 293-2500

Its Attorneys

October 20, 1997

TABLE OF CONTENTS

SUMMARY

The Telecommunications Resellers Association ("TRA"), a trade association representing more than 550 entities engaged in, or providing products and services in support of, telecommunications resale, hereby respectfully urges the Commission to deny the Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively "BellSouth") for authority to provide interLATA service "originating" within the BellSouth "in-region State" of South Carolina. BellSouth has failed not only to satisfy the threshold requirements set forth in Section 271(c) for Bell Operating Company provision of "in-region," interLATA service, but has not demonstrated that grant of the authorization it seeks would be consistent with the public interest, convenience and necessity, as required by Section 271(d)(3)(C). Among the deficiencies which undermine the BellSouth Application and preclude its grant are the following:

- BellSouth has not satisfied the threshold requirements of Section 271(c)(1); it cannot proceed under "Track A" because it has not shown that it is facing actual facilities-based competition, and it is precluded from proceeding under "Track B" because it has received multiple qualifying requests for network access/interconnection from carriers which individually or in combination intend to serve both business and residential users using their own facilities or network elements obtained from BellSouth on an unbundled basis.

- BellSouth has not fully satisfied the 14-point "competitive checklist".

    - BellSouth unlawfully restricts the resale of contract service arrangements and has not demonstrated that its wholesale discounts reflect reasonably avoided retail costs determined through an appropriate cost study or reflect final, as opposed to interim, values.

    - BellSouth has not demonstrated that its rates and charges for unbundled network access reflect forward-looking economic costs determined using a TELRIC pricing methodology or reflect final, as opposed to interim, values.

- BellSouth has not demonstrated that its OSS interfaces and functionalities are adequately sized, have been sufficiently tested and are commercially viable.

- BellSouth has proposed to charge separately for vertical features that are encompassed within the local switching element in contravention of Commission determinations to the contrary.

- Deficiencies in BellSouth's OSS functionalities render access to unbundled network elements inadequate

- BellSouth has evidenced a clear intent to disregard Commission policies and rules with which it disagrees.

- BellSouth has not demonstrated that the public interest would be served by its entry into the "in-region," interLATA market prior to the emergence of meaningful facilities-based local exchange/exchange access service alternatives.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	)	
APPLICATION OF BELLSOUTH CORPORATION, BELLSOUTH TELECOMMUNICATIONS, INC. AND BELLSOUTH LONG DISTANCE, INC. FOR PROVISION OF IN-REGION, INTERLATA SERVICES IN SOUTH CAROLINA	)	**CC Docket No. 97-208**

OPPOSITION OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Public Notice, DA 97-2112 (released September 30, 1997), hereby opposes the application ("Application") filed by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively "BellSouth") under Section 271(d) of the Communications Act of 1934 ("Communications Act"),[1] as amended by Section 151 of the Telecommunications Act of 1996 ("Telecommunications Act")[2] for authority to provide interLATA

---

1 47 U.S.C. § 271(d).

2 Pub. L. No. 104-104, 110 Stat. 56, § 151 (1996).

service "originating" within the BellSouth "in-region State" of South Carolina.[3] As TRA will demonstrate below, BellSouth has failed not only to satisfy the threshold requirements set forth in Section 271(c) for Bell Operating Company ("BOC") provision of "in-region," interLATA service,[4] but has not demonstrated that grant of the authorization it seeks would be consistent with the public interest, convenience and necessity, as required by Section 271(d)(3)(C).[5] Given that the Commission cannot, therefore, make the affirmative findings required by Section 271(d)(3), TRA submits that the BellSouth Application cannot be granted. TRA, accordingly, urges the Commission to deny BellSouth the "in-region," interLATA authority it seeks here.

I.

INTRODUCTION

A national trade association, TRA represents more than 550 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of domestic interexchange telecommunications services, TRA's resale carrier members

---

[3] An "in-region State" is "a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before the date of enactment of the Telecommunications Act of 1996." 47 U.S.C. § 271(i)(1).

[4] 47 U.S.C. § 271(c).

[5] 47 U.S.C. § 271(d)(3)(C).

have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services. TRA's resale carrier members are also among the many new market entrants that are or will soon be offering local exchange and/or exchange access services, generally through traditional "total service" resale of incumbent local exchange carrier ("LEC") or competitive LEC retail service offerings or by recombining unbundled network elements obtained from incumbent LECs, often with their own switching facilities, to create "virtual local exchange networks."[6] TRA's resale carrier members, accordingly, will not only be direct competitors of BellSouth in the local exchange, long distance and other markets, but will be reliant upon BellSouth as an incumbent LEC for wholesale services and access to unbundled network elements, as well as for exchange access services.

TRA's interest in this matter is in protecting, preserving and promoting competition within the interexchange market, as well as in speeding the emergence and growth of resale, non-facilities-based, and ultimately facilities-based competition in local exchange/exchange access markets within the State of South Carolina and elsewhere.[7] Permitting premature entry by any of the BOCs, including BellSouth, into the "in-region," interLATA market would jeopardize the vibrant and dynamic competition that now characterizes the interexchange market, and retard the emergence and development of competitive local exchange/exchange access markets. As the Commission has recognized, there are a host of ways in which control of local exchange/exchange "bottlenecks" can

---

[6] The most recent survey of TRA's resale carrier members found that 33 percent are currently offering local exchange service; another 38 percent of TRA's resale carrier members plan to enter the local market within the next 12 months.

[7] Through the South Carolina Competitive Carriers Association, TRA has been an active participant in Docket No. 97-101-C , In Re: Entry of BellSouth Telecommunications, Inc. into InterLATA Toll Market, before the Public Service Commission of South Carolina ("SCPSC").

be leveraged by the BOCs and other incumbent LECs to disadvantage interexchange carrier rivals.[8]

---

[8] *See, e.g.,* Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, 11 FCC Rcd. 21905, ¶¶ 7 - 13 (1996) ("Non-Accounting Safeguards Order"), *recon.* 12 FCC Rcd. 2297 (1997), *pet. for rev. pending sub nom.* SBC Communications Corp. v. FCC, Case No. 97-1118 (D.C. Cir. Mar. 6, 1997), *remanded in part sub nom.* Bell Atlantic Tel. Cos. v. FCC, Case No. 97-1067 (D.C. Cir. Mar. 31, 1997), *further recon on remand* FCC 97-222 (released June 24, 1997), *pet. for rev. pending sub nom* Bell Atlantic Tel. Cos. v. FCC, Case No. 97-1067 (D.C. Cir. July 11, 1997). As described by the Commission:

> If a BOC is regulated under rate-of-return regulation, a price caps structure with sharing (either for interstate or intrastate services), a price caps scheme that adjusts the X-factor periodically based on changes in industry productivity, or if any revenues it is allowed to recover are based on costs recorded in regulated books of account, it may have an incentive to allocate improperly to its regulated core business costs that would be properly allocated to its competitive ventures. . . . In addition, a BOC may have an incentive to discriminate in providing exchange access services and facilities that its affiliate's rivals need to compete in the interLATA telecommunications services and information services markets. For example, a BOC may have an incentive to degrade services and facilities furnished to its affiliate's rivals, in order to deprive those rivals of efficiencies that its affiliate enjoys. Moreover, to the extent carriers offer both local and interLATA services as a bundled offering, a BOC that discriminates against the rivals of its affiliates could entrench its position in local markets by making these rivals' offerings less attractive. . . . Moreover, if a BOC charges other firms for inputs that are higher than the prices charged, or effectively charged, to the BOC's section 272 affiliate, then the BOC could create a 'price squeeze.' In that circumstance, the BOC affiliate could lower its retail price to reflect its unfair cost advantage, and competing providers would be forced either to match the price reduction and absorb profit margin reductions or maintain their retail prices at existing levels and accept market share reductions. This artificial advantage may allow the BOC affiliate to win customers even though a competing carrier may be a more efficient provider in serving the customer. Unlawful discriminatory preferences in the quality of the service or preferential dissemination of information provided by BOCs to their section 272 affiliates, as a practical matter, can have the same effect as charging unlawfully discriminatory prices. If a

[footnote continued on following page]

The Commission has further recognized that the BOCs and other incumbent LECs can erect a variety of economic and operational barriers to competitive entry into, and competitive survival in, the local telecommunications market.[9]

As the Commission has acknowledged, monopolists do not readily relinquish market power; theoretically "contestable" markets cannot be miraculously transformed into actually

---

[footnote continued from preceding page]

> BOC charged the same rate to its affiliate for a higher quality access service than the BOC charged to unaffiliated entities for a lower quality service . . . the BOC could effectively create the same 'price squeeze' discussed above.

Non-Accounting Safeguards Order, 11 FCC Rcd. 21905 at ¶¶ 10 - 12 (footnotes omitted).

[9] *See, e.g.,* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶¶ 10 - 23 (1996) ("Local Competition First Report and Order), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, FCC 97-295 (Oct. 2, 1997), *aff'd in part, vacated in part sub. nom.* Iowa Utilities Board v. FCC, Case No. 96-3321, 1997 WL 403401 (8th Cir. July 18, 1997) ("Iowa Utilities Board"), *rehearing* (Oct. 14, 1997), *pet. for rev. pending sub. nom.,* Southwestern Bell Telephone Co. v. FCC, Case No. 97-3389 (Sept. 5, 1997). Among other things, the Commission has noted:

> An incumbent LEC . . . has the ability to act on its incentive to discourage entry and robust competition by not interconnecting its network with the new entrant's network or by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incumbent LEC's subscribers. . . . Vigorous competition would be impeded by technical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs. . . . This Order addresses other operational barriers to competition, such as access to rights of way, collocation, and the expeditious provisioning of resale and unbundled elements to new entrants. The elimination of these obstacles is essential if there is to be fair opportunity to compete in the local exchange and exchange access markets.

Local Competition First Report and Order, 11 FCC Rcd. 15499 at ¶¶ 11, 16, 17.

"contested" markets overnight.[10] Unless there exists a potent countervailing incentive or disincentive to do otherwise, it can be anticipated that the BOCs, including BellSouth, and other incumbent LECs will actively seek to forestall local exchange/exchange access competition as a profit maximizing strategy. And given past practices, it can also be anticipated that the BOCS, including BellSouth, and other incumbent LECs will utilize their "bottleneck" control of exchange access facilities to disadvantage interexchange competitors.[11]

TRA submits that BOC and other incumbent LEC market conduct will be adequately disciplined only when viable facilities-based competition has emerged in the local exchange/exchange access market and that the only incentive that may be strong enough to motivate the BOCs to permit such facilities-based competitive entry is their desire to provide "in-region," interLATA services. As succinctly stated by the Commission:

> We find that incumbent LECs have no economic incentive, *independent of the incentives set forth in sections 271 and 274 of the 1996 Act,* to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services.[12]

---

[10] *See, e.g.,* id.

[11] *See, e.g.,* United States v. Western Electric Co., 767 F.Supp. 308, 322 (D.D.C. 1991) ("Where the Regional Companies have been permitted to engage in activities because it appeared to the Court that the likelihood of anticompetitive conduct was small, they have nevertheless already managed to engage in such conduct . . .").

[12] Local Competition First Report and Order, 11 FCC Rcd. 15499 at ¶ 55 (emphasis added). As the Chief Executive Officer of one BOC candidly acknowledged:

> The big difference between us and [the GTE] is they're already in long distance. What's their incentive to cooperate.

"Holding the Line on Local Phone Rivalry," The Washington Post, pp. C-12, C-14 (Oct. 23, 1996).

Thus, the Commission reasoned, "Section 271 . . . creates a critically important incentive for BOCs to cooperate in introducing competition in their historically monopolized local telecommunications markets."[13]

Hence, the public interest would not be served by sanctioning origination of interLATA traffic by BellSouth within the "in-region State" of South Carolina until the bulk of the residents of the State are able to select among multiple facilities-based providers of local exchange/exchange access service. In other words, BellSouth should not be awarded the authority it seeks here until it is facing viable facilities-based competition in at least the major population centers within the State of South Carolina. Certainly, BellSouth should not be granted such authority until the carrier has "taken real, significant, and irreversible steps to open . . . [its] markets [to competition" and those markets are indeed "open to competition."[14]

The Commission has an opportunity to realize the Congressional vision reflected in the Telecommunications Act of an integrated, fully competitive telecommunications marketplace. That opportunity should not be lost by simply giving away the "carrot" relied upon by Congress to prompt "the opening [of] all telecommunications markets to competition."[15] As the Commission has recognized, "in the absence of . . . incentives . . . directed at compelling incumbent LECs to share

---

[13] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298, ¶ 14 (Aug. 19, 1997).

[14] Id.

[15] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) ("Joint Explanatory Statement").

their economies of scale and scope with their rivals, it would be highly unlikely that competition would develop in local exchange and exchange access markets to any discernable degree."[16]

II.

ARGUMENT

A. Procedures For Reviewing BOC Applications For "In-Region," InterLATA Authority Under Section 271

Within ninety days following submission by a BOC of an application to provide interLATA services originating (or in the case of inbound and private line services, terminating) within a State in which the BOC provides local exchange/exchange access service as an incumbent LEC, the Commission must issue a written determination approving or denying the application.[17] In undertaking that review, the Commission must consult with, and give "substantial weight" to the recommendations of the U.S. Department of Justice;[18] the Commission must also consult with the telecommunications regulatory authority of the State that is the subject of the BOC application to verify the compliance of the applying BOC with the requirements for providing "in-region,"

---

[16] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 18.

[17] 47 U.S.C. § 271(d)(3).

[18] 47 U.S.C. § 271(d)(2)(A).

nterLATA services set forth in Section 271(c),[19] although the State Commission's views are not dispositive as to these matters.[20]

The Commission may not grant a BOC application for "in-region," interLATA authority unless it makes an affirmative determination that the applying BOC has met the requirements of Section 271(c)(1) and (2) for the State for which authorization is sought, including: (i) a showing that either the BOC is providing, pursuant to one or more binding agreements approved by the State Commission under Section 252, access and interconnection to its facilities for the network facilities of one or more unaffiliated competitors that are providing telephone exchange services to residential and business subscribers exclusively or predominantly over their own landline telephone exchange service facilities, or, if no such unaffiliated facilities-based competitors have requested such network access and interconnection, the BOC is offering to provide such access and interconnection pursuant to a Statement of Generally Available Terms and Conditions ("SGATC") approved or permitted to take effect by the State Commission, and (ii) a demonstration that it has fully implemented in one or more access and interconnection agreements with facilities-based competitors or offered in a SGATC all fourteen items included on the "competitive checklist."[21] For the Commission to determine that a BOC has fully satisfied the 14-point "competitive checklist," the BOC must have provided competitive LECs with (i) physical interconnection of network

---

19 47 U.S.C. § 271(d)(2)(A).

20 Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121, FCC 97-228, ¶ 15 (June 26, 1997), , *pet. for rev. pending sub nom.* SBC Communications Corp. v. FCC, Case No. 97-1425 (D.C. Cir. July 3, 1997).

21 47 U.S.C. §§ 271(c), 271(d)(3)(A).

facilities at cost-based rates, (ii) nondiscriminatory access at cost-based rates to unbundled network elements, including local loop, local transport, local switching, and database and associated switching, as well as to poles, ducts, conduits and other rights of way, 911 and E911 service, directory assistance, operator call completion services and white pages directory listings, (iii) viable interim telecommunications number portability, (iv) local dialing parity, (v) reciprocal compensation arrangements, and (vi) opportunities to resell all retail service offerings at wholesale rates reflective of reasonably avoidable costs.[22]

Before granting a BOC application for "in-region," interLATA authority, the Commission must further make an affirmative determination that any authorization it grants to the applying BOC will be carried out in accordance with the structural and transactional requirements, nondiscrimination safeguards, audit obligations and marketing restrictions set forth in Section 272.[23] And critically, the Commission must find that grant of the requested in-region authority is consistent with the public interest, convenience and necessity.[24]

B. BellSouth Has Failed To Make The Threshold Showing Required By Section 271(c)(1)

As noted above, a threshold showing which must be made by a BOC seeking "in-region," interLATA authority pursuant to Section 271 is that the carrier is either (i) facing actual facilities-based competition in the State as required by Section 271(c)(1)(A); or (ii) is entitled to proceed under Section 271(c)(1)(B) because no competitor capable of providing such residential and

---

22 47 U.S.C. § 271(c)(2)(B).

23 47 U.S.C. §§ 271(d)(3)(C); 272.

24 47 U.S.C. § 271(d)(3)(C).

business service has requested access and interconnection from the BOC.[25] BellSouth has made neither showing here. By its own admission, BellSouth is unable to demonstrate the presence of facilities-based competition in South Carolina and thus cannot make the requisite "Track A" showing.[26] Further, BellSouth is a party to scores of binding interconnection agreements, many with carriers who stand ready and able, but for the continuing operational implementation obstacles which continue to characterize their dealings with BellSouth, to provide such facilities-based service to both residential and business subscribers in South Carolina.[27] The BellSouth is thus precluded from seeking entry under "Track B."

Reluctantly revealing in its Brief that its competitors are attempting to provide facilities-based offerings sufficient to satisfy Track A, BellSouth nevertheless urges the Commission to "predict" that facilities-based competition will not develop in South Carolina.[28] To the contrary, even these nascent efforts by BellSouth's competitors indicate that new entrants are actively seeking to develop such facilities-based competition and, given the time and the realistic opportunity, will do so. Accordingly, the Commission's "predictive judgment" to determine whether a potential competitor's request will lead to the type of telephone exchange service described in section 271(c)(1)(A) must be answered in the affirmative here. TRA thus urges the Commission to reject BellSouth's Application as premature under Track A and foreclosed under Track B.

---

[25] 47 U.S.C. § 271(c)(1)(A) & (B).

[26] Brief in Support of Application of BellSouth for Provision of In-region, InterLATA Service in South Carolina at 8-15 ("BellSouth Brief").

[27] Id. at 5 - 6.

[28] Id. at 15 - 16.

1. BellSouth Cannot Proceed Under Track A Because It Is Not Facing Facilities-Based Competition

The Commission has found that in order to satisfy Track A, "the primary vehicle for BOC entry in section 271,"[29] a BOC must demonstrate, among other things, that pursuant to binding interconnection agreements, it is facing competition from carriers "actually in the market and operational",[30] serving either individually or collectively residential and business subscribers,[31] either exclusively or predominantly over their own telephone exchange service facilities, including the offering of service by means of unbundled network elements.[32] BellSouth acknowledges that it has "voluntarily negotiated over 80 interconnection and resale agreements with requesting carriers in South Carolina,"[33] but admits that to its knowledge no single entity (or combination of entities) exists whose service offerings would constitute facilities-based competition sufficient to satisfy the dictates of Track A.[34]

Notwithstanding its own admission that facilities-based competition sufficient to satisfy Track A does not exist, BellSouth seeks to retain the possibility of proceeding under Track

---

29 Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121, FCC 97-228 at ¶ 41.

30 Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 75.

31 Id. at ¶ 83.

32 Id. at ¶ 96.

33 BellSouth Brief at ii.

34 Id. at iii.

A by essentially shifting the burden of identifying and quantifying such facilities-based competition onto the Commission itself. Positing that "[t]his application may be proper under 'Track A' (47 U.S.C. §271(c)(1)(A)) as well,"[35] BellSouth seeks to enlist the Commission's assistance in documenting the existence and extent of facilities-based competition, urging that "the Commission should request that parties who provide or intend to provide local services in South Carolina detail their current or planned services in their comments on this Application."[36] Apparently BellSouth believes it appropriate that, should the Commission take the unprecedented step of compelling BellSouth's competitors to provide the evidence which might satisfy BellSouth's burden of proof on behalf of the BOC, the Commission should then take the further step of evaluating the merits of the instant application in light of this later-developed evidence.

In addressing an applicant's burden of proof with respect to a Section 271 application, the Commission has held that "the ultimate burden of proof with respect to factual issues [such as the existence of facilities-based competition] remains at all times with the BOC, even if no party opposes the BOC's application."[37] Further, as the Commission has repeatedly stated, "we expect that a section 271 application, *as originally filed*, will include all of the factual evidence on which the

---

35 Id.

36 Id. at 16.

37 Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 43, (*citing* Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121, FCC 97-228 at ¶ 13).

applicant would have the Commission rely in making its findings thereon"[38] and "that such evidence will be clearly described and arguments will be clearly stated in its legal brief."[39]

Finally, noting that "the timing of a section 271 filing is one that is solely within the applicant's control," the Commission has required a BOC, upon the filing of its application, to be "already in full compliance with the requirements of section 271 and submit[] with its application sufficient factual evidence to demonstrate such compliance . . . If, after the date of filing, the BOC concludes that additional information is necessary, or additional actions must be taken, in order to demonstrate compliance with the requirements of section 271, the BOC's application is premature and should be withdrawn."[40] Here, BellSouth indicates that *as of the date of filing*, insufficient evidence of facilities-based competition is available to enable it to make use of Track A. Entreating the Commission to require BellSouth's competitors to satisfy the BOC's burden of proof, while certainly an innovative approach, is in direct conflict with the Commission's requirement that in order to prevail, an applicant -- and the applicant alone -- must satisfy its own burden of proof. Thus, the Commission should reject BellSouth's contention that Track A is -- or even may be -- available to it here.

---

[38] *December 6th Public Notice*, 11 FCC Rcd. at 19709; *Ameritech February 7th Order*, 12 FCC Rcd. at 3320; *September 19th Public Notice*, "Revised Procedures for Bell Operating Company Applications Under Section 271 of the Communications Act", FCC 97-330 at 2 (emphasis added).

[39] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 60.

[40] Id. at ¶ 55.

2. BellSouth Is Not Entitled To Proceed Under Track B Because Competitors Intend To Provide, And Given The Opportunity, Will Provide, Facilities-Based Residential And Commercial Service Offerings

In a narrowly-crafted exception, Section 271(c)(1) permits a BOC to proceed under Track B even though it has received qualifying requests for network access and interconnection when *through no fault of its own* both Track A and Track B would otherwise remain unavailable to the BOC indefinitely. BellSouth seeks to avail itself of this narrowly-crafted exception by cleverly attempting to shift responsibility for its own inability to facilitate the development of facilities-based local competition onto new market entrants. BellSouth's efforts to circumvent the clearly expressed intention of Congress that a BOC must face facilities-based competition prior to the grant of "in-region," interLATA authority by this sleight of hand, represents the antithesis of the purpose for which Track B was enacted and must be rejected by the Commission.

Congress has recognized that "the development of competition in local exchange markets is dependent, to a large extent, on the opening of the BOCs' networks"[41] and as a necessary incentive to the opening of the BOCs' networks, has appropriately elevated "Track A to be the primary vehicle for BOC entry in section 271."[42] Track B "serve[s] as a limited exception to the Track A requirement of operational competition"[43] meant to ensure solely that a BOC otherwise entitled to seek Section 271 authority would not be prevented from doing so in those rare

---

41 Id. at ¶ 44.

42 Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121, FCC 97-228 at ¶ 41.

43 Id. at ¶ 46.

circumstances in which potential competitors either have not requested access or interconnection, or have affirmatively attempted to distort the negotiation and implementation process to the BOC's disadvantage.[44]

Such rare circumstances are not present here. To the contrary, BellSouth finds itself within the entirely ordinary, and entirely foreseeable, period of time "during which requests from potential competitors would preclude BOCs from applying under Track B while requesting carriers are in the process of becoming operational competitors;"[45] in other words, "when Track B is unavailable, but the BOC has not yet satisfied the requirements of section 271(c)(1)(A)."[46] Undeniably, Congress "expressly recognized that it would take time for competitors to construct and upgrade networks and then to extend service offerings to residential and business subscribers."[47]

The Commission has likewise recognized that allowing a BOC to proceed under Track B up to the point of actual initiation of service by a potential competitor would imbue the BOC with a clear incentive to delay the opening of its network to competition.[48] Thus, in order that a BOC not be permitted to impede the development of competition by delaying or hampering the implementation of competitors' interconnection agreements, the inability of a BOC to proceed under Track B is triggered not by the actual provision of service to both residential and business market

---

44 Id.

45 Id. at ¶ 41.

46 Id. at ¶ 45.

47 Id. at ¶ 43.

48 Id. at ¶ 52.

segments, but rather by receipt by a BOC for a request for network access/interconnection -- such as many of the more than 80 interconnection requests received by BellSouth.

BellSouth asserts that none of these numerous requests constitute "qualifying requests" because despite the opportunity to do so, competitors have not aggressively entered the local residential market on a facilities basis. BellSouth glosses over, however, the difficulties which such carriers have encountered in attempts to enter the local market. Indeed, directly contrary to its assertions, BellSouth has clearly not "done its part to allow competitive entry by negotiating agreements with individual CLECs and offering interconnection and network access."[49] BellSouth is further obligated to fulfill the terms of network access and interconnection agreements in compliance with the "competitive checklist." As demonstrated below, this is a obligation which BellSouth remains unable to fulfill. Of the over 80 requesting carriers with whom BellSouth has entered agreements, those which seek to provide service either exclusively or predominantly over their own telephone exchange service facilities have been prevented from initiating service offerings which might lead to the satisfaction of Track A by BellSouth's own failure -- or reluctance -- to satisfy the terms of those access and interconnection agreements in a manner capable of allowing such facilities-based service offerings to develop and flourish.

In determining the nature of a qualifying interconnection request under Track A, the Commission has held that "such a request need not be made by an operational competing provider . . . rather, the qualifying request may be submitted by a potential provider of telephone exchange

---

[49] BellSouth Brief at 5.

service to residential and business subscriber."[50] It is sufficient that "the request from a potential competitor must be one that, *if implemented*, will satisfy section 271(c)(1)(A),"[51] a standard which the requests of many of BellSouth's competitors satisfy. BellSouth implausibly asserts, however, that notwithstanding the existence of numerous network access and interconnection agreements, the Commission should allow it to proceed under Track B because not one of its more than 80 potential competitors -- including such industry giants as AT&T and MCI, which have publicly and repeatedly announced intentions to provide comprehensive local service offerings on a nationwide basis -- can satisfy this standard in South Carolina. BellSouth's assessment of the record is at best misleading and is contradicted elsewhere in its Brief by descriptions of the efforts of competitors to initiate facilities-based service offerings which would lead to the satisfaction of Track A.[52]

In considering the ability of competing carriers to implement their interconnection requests to BellSouth, the Commission will necessarily be mindful that the record in this proceeding is replete with testimony which repudiates BellSouth's "claims that the decision not to provide residential facilities-based services rests solely with its competitors."[53] Actual competitors of BellSouth attribute the nascent state of facilities-based competition in the BellSouth region not to disinterest or lack of effort, but to such factors as "difficulties in provisioning its initial orders for

---

[50] Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121, FCC 97-228 at ¶ 27.

[51] Id. at ¶ 54.

[52] BellSouth Brief at 15-17.

[53] Brief of American Communications Services, Inc., p. 8, filed in Docket No. 97-101-C, In Re: Entry of BellSouth Telecommunications, Inc. into InterLATA Toll Market. .

unbundled loops and number portability," "rates for unbundled elements creat[ing] a price squeeze making it economically infeasible to serve residential customers," and "unreasonable delays and customer service disruptions."[54]

As the Commission notes, "a difficult predictive judgment to determine whether a potential competitor's request will lead to the type of telephone exchange service described in section 271(c)(1)(A) . . . is required by the terms of section 271 and is consistent with the statutory scheme envisioned by Congress."[55] In fulfilling this analytical obligation, the Commission can neither ignore nor discount the qualifying requests BellSouth has received in South Carolina, requests which are not invalidated simply because BellSouth has thwarted the full implementation of those requests.

BellSouth urges the Commission to predict that facilities-based competition will not develop in South Carolina even as it reveals in its Brief the efforts of its competitors to initiate facilities-based residential service offerings to local subscribers.[56] In light of the clearly expressed preference of Congress for the existence of actual facilities-based competition prior to grant of "in-region," interLATA authority to a BOC, as well as Congress' recognition that facilities-based competition will only develop over a period of time -- time during which neither Track A nor Track B will be available to a BOC -- TRA submits that the Commission can only reasonably determine that competition to satisfy the dictates of Track A will develop precisely as envisioned by Congress.

---

54 Id. at 6, 8, 9.

55 Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121, FCC 97-228 at ¶57.

56 BellSouth Brief at 16.

C. BellSouth Has Not As Yet Fully Satisfied The 14-Point "Competitive Checklist"

A BOC that seeks "in-region," interLATA authority must demonstrate that it has "fully implemented the competitive checklist" if proceeding under Track A or has "generally offered" in a SGATCs "all items included in the competitive checklist," if proceeding under Track B.[57] Under either Track A or Track B, the network access and interconnection made available by the BOC must encompass each of the fourteen items incorporated into the Section 271(c)(2)(B) 14-point "competitive checklist." Failure by the BOC to provide or generally offer one or more of the "competitive checklist" items will be fatal to the BOC's application.[58]

BellSouth's Application must be rejected because the carrier has not "met its burden of showing that it has . . . [made available] access to . . . [all fourteen "competitive checklist" items] in accordance with the requirements of Section 271(c)(2)(B)."[59]

1. BellSouth Has Not Made Telecommunications Services Available For Resale In Accordance With Sections 251(c)(4) And 252(d)(3)

BellSouth has a statutory obligation "to offer for resale at wholesale rates any telecommunications service that . . . [it] provides at retail to subscribers who are not telecommunications carriers" and "not to prohibit, and not to impose unreasonable or discriminatory

---

57 47 U.S.C. § 271(d)(3)(A).

58 Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 105.

59 Id.